

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
)
Auction of Interactive Video and Data Service)
Licenses Scheduled to Begin February 18, 1997)
)
Emergency Motion for Stay, Pendente Lite of)
Commercial Realty St. Pete, Inc.)
)
Emergency Motion for Partial Stay of)
Interactive America Corporation)

ORDER

Adopted: January 6, 1997

Released: January 6, 1997

By the Chief, Wireless Telecommunications Bureau:

1. We have before us: (a) an Emergency Motion for Stay, Pendente Lite filed by Commercial Realty St. Pete, Inc. (CRSPI) on December 16, 1996; and (b) an Emergency Motion for Partial Stay filed by Interactive America Corporation (IAC) on December 17, 1996 (collectively, the "Stay Requests"). CRSPI seeks to stay the auction of 981 Interactive Video and Data Service (IVDS) licenses scheduled to begin on February 18, 1997. IAC seeks to stay the IVDS auction with respect to the fifteen Metropolitan Statistical Area (MSA) IVDS licenses being reaucted for which IAC was the winning bidder in the initial IVDS auction conducted in July 1994. Both CRSPI and IAC rely on the four prong test for issuance of a stay set forth by the U.S. Court of Appeals for the D.C. Circuit in *Virginia Petroleum Jobbers Ass'n v. FPC*,¹ as modified in *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*² For the reasons discussed below, we hereby deny the Stay Requests.

¹ 259 F.2d 921 (D.C. Cir. 1958).

² 559 F.2d 841 (D.C. Cir. 1977). Under this test, a stay is warranted if the movant can demonstrate that: (1) it is likely to prevail on the merits; (2) it will suffer irreparable harm absent a stay; (3) interested parties will not be harmed if the stay is granted; and (4) the public interest would favor a grant of the stay.

2. Background. CRSPI and IAC were winning bidders in the IVDS auction conducted in July 1994 who failed to make timely down payments on the licenses they won, and whose requests for waiver of the payment deadline were denied by the Commission.³ Both parties have petitioned the U.S. Court of Appeals for the D.C. Circuit for review of the Commission's decision to deny the waiver requests.⁴ On December 4, 1996, the Bureau announced that the Commission would commence an auction of IVDS licenses on February 18, 1997. The auction consists of previously unlicensed IVDS spectrum serving the Rural Service Areas (RSA) of the United States, plus selected MSA licenses where the winning bidders from the July 1994 IVDS auction have been found to be in default.⁵ Among the 125 MSA licenses being reaucted are the twenty licenses for which CRSPI failed to make timely down payments and the fifteen licenses for which IAC failed to make timely down payments.⁶

3. CRSPI requests that the Commission stay the entire IVDS auction, whereas IAC requests only a stay of the reauction of the fifteen MSA licenses it won in the initial IVDS auction. Both parties seek their respective injunctive relief until disposition of the pending Court of Appeals case. While maintaining that a stay should be granted because they are likely to succeed on the merits of their claim, both parties emphasize the alleged irreparable injury they would incur should the Commission reauction the disputed licenses before disposition of the court case. In that regard, CRSPI alleges that grant of the licenses for which CRSPI failed to make timely down payments will moot CRSPI's appeal, claiming that, once the spectrum is licensed to another party, the Court of Appeals has no power to provide meaningful relief even to a successful petitioner. IAC is primarily concerned that the Commission will cause unnecessary and irreparable expenditure of time and money by both IAC and the reauction winners to litigate competing claims on the fifteen licenses for which IAC failed to make timely down payments. Finally, both CRSPI and IAC also maintain that granting a stay would not prejudice the rights of any parties and that a stay would serve the public interest.

4. Discussion. After examining the Stay Requests, we find that CRSPI and IAC have neither made a strong showing that they are likely to prevail on appeal nor a substantial case under the other criteria for a stay. In this case, CRSPI and IAC have not raised any new legal arguments that are sufficiently strong in the context of a stay request to meet the "likelihood of success on appeal" test. Such issues as auction winners' confusion over equipment availability, disparate

³ See Requests for Waivers in the First Auction of Interactive Video and Data Service (IVDS) Licenses, *Order*, 9 FCC Rcd 6384 (CCB 1994), *review denied*, *Memorandum Opinion and Order*, 10 FCC Rcd 12153 (1995), *recon. denied*, *Memorandum Opinion and Order*, 11 FCC Rcd 8211 (1996).

⁴ See *Commercial Realty St. Pete, Inc. v. FCC*, No. 96-1271 (D.C. Cir., filed August 7, 1996), consolidated with *Interactive America Corp. v. FCC*, No. 96-1320 (D.C. Cir., filed September 6, 1996).

⁵ See *Public Notice*, "Auction of Interactive Video and Data Service (IVDS), DA 96-1958, Report No. AUC-96-13-A" (rel. December 4, 1996); *correction*, Report No. AUC-96-13-B (rel. December 10, 1996); *modification*, Report No. AUC-96-13-C (rel. December 17, 1996).

⁶ Attachment A lists the licenses to be reaucted for which CRSPI and IAC failed to make timely down payments.

treatment of parties, and whether the Commission gave reasoned consideration to waiver requests have already been persuasively addressed by the Commission.⁷ In any event, an evaluation of the Stay Requests under the remaining factors of the *Virginia Petroleum/Holiday Tours* test reveals that CRSPI and IAC have not demonstrated satisfaction of the stringent standards required for a stay pending court review.

5. Specifically, we find that CRSPI and IAC have failed to demonstrate the threshold requirement for obtaining a stay — that they would suffer irreparable harm in the absence of a stay. An injury qualifies as "irreparable harm" only if it is "both certain and great; it must be actual and not theoretical."⁸ Therefore, to demonstrate irreparable harm, CRSPI and IAC must provide "proof indicating that the harm [it alleges] is *certain to occur* in the near future."⁹ CRSPI and IAC have supplied no such proof. As an initial matter, both parties' arguments are premised on the purported irretrievable loss of the licenses for which they failed to make timely down payments should the reauction move forward. This argument disregards the fact that FCC licensing arises under the Communications Act, and any licenses awarded at the subject auction are, as a matter of law, subject to the outcome of the pending court cases.¹⁰ Therefore, the reauction of licenses for which these parties failed to make timely down payments does not moot the cases on appeal.¹¹ In the unlikely event that the Court were to agree with the parties on the merits of their petitions, the FCC would take whatever steps were necessary to afford the winning party the benefit of that ruling.¹² Such FCC action would not require significant further litigation time or expense; in any event, even substantial injuries in terms of money, time and energy expended in the absence of a stay are not adequate grounds to justify a stay.¹³ In that regard, we make it clear to these parties and all auction participants that any award of an IVDS license through the reauction process would be taken subject to the results of the pending court case. This is a familiar aspect of any Commission action that is currently under

⁷ See *supra* footnote 3.

⁸ *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985).

⁹ *Id.* (emphasis added).

¹⁰ See, e.g., *Alianza Federal de Mercedes v. FCC*, 539 F.2d 732, 735-36 (D.C. Cir. 1976) (grant of FCC licenses are subject to limitations of the Communications Act, including the right of judicial review and obligation of the Commission to give effect to any presiding judgment).

¹¹ See *id.* at 736 (grant of a license renewal did not render moot the appeal from the grant of that license for the preceding period). Therefore, CRSPI's cites to mootness cases are irrelevant.

¹² See, e.g., *FCC v. Radiofone, Inc.*, 116 S. Ct. 283 (Oct. 25, 1995) (Stevens, J., in chambers), *motion to vac. denied*, 116 S. Ct. 373 (Oct. 30, 1995).

¹³ *Virginia Petroleum*, 259 F.2d at 925; see also *Wisconsin Gas*, 758 F.2d at 674; Price Cap Regulation of Local Exchange Carriers, 10 FCC Rcd 11979, 11987 ¶ 19 (1995).

appeal, and is a well-known implied condition of being a Commission licensee.¹⁴ Notwithstanding IAC's insistence to the contrary, the Commission's auction announcements need not expressly disclose matters of public record such as pending court cases that would be discovered through the level of due diligence we presume from potential auction participants. We fully expect that IVDS applicants who anticipate bidding on licenses subject to litigation will take into account that fact in their decision to participate in the auction and the amount to bid for such licenses. Thus, any harm to CRSPI, IAC, or any of the bidders in the upcoming reauction in the absence of a stay is not irreparable.

6. Further, we find that grant of the Stay Requests would not serve the public interest, for doing so would defeat the overarching policy objectives of the auction statute, which requires the FCC, in designing an auction system, to promote the "rapid deployment of new technologies, products and services for the benefit of the public"¹⁵ If we were to accept the general arguments for granting the stay raised by CRSPI and IAC, subsequent spectrum reauctions would be at risk of substantial postponement while courts reviewed the myriad issues parties raised in attempts to circumvent reauctions for their individual purposes, such as procuring additional funds to cure a default in payment obligations. As noted above, these parties' weak arguments on the merits do not warrant the extraordinary relief they seek; granting such relief would simply reward those who fail to make timely payments at the expense of the public interest by frustrating the business plans of entities planning to bid on and pay for IVDS licenses in the upcoming auction and initiate service to the public. Such a result would defeat the integrity of the expeditious auction process, unduly delaying the Commission from realizing its statutory obligations.

7. Conclusion. CRSPI and IAC have failed to make the requisite showings of irreparable harm and public interest that are necessary to justify the extraordinary relief they seek. For these reasons, CRSPI's Emergency Motion for Stay, Pendente Lite and IAC's Emergency Motion for Partial Stay ARE DENIED.

8. This action is taken pursuant to authority delegated by § 0.131 of the Commission's Rules, 47 C.F.R. § 0.131.

FEDERAL COMMUNICATIONS COMMISSION

Michele C. Farquhar, Chief
Wireless Telecommunications Bureau

¹⁴ See, e.g., *Alianza*, 539 F.2d at 735-36; Revision of Rules and Policies for the Direct Broadcast Satellite Service, *Report and Order*, 11 FCC Rcd 9712, 9773 ¶ 152 (1995).

¹⁵ 47 U.S.C. § 309(j)(3)(A).

ATTACHMENT A

20 licenses for which Commercial Realty St. Pete, Inc. failed to make timely down payments:

<u>MSA</u>	<u>License No.</u>
Detroit-Ann Arbor, MI	ZVM005A
St. Louis, MO	ZVM011A
Miami-Fort Lauderdale-Hollywood, FL	ZVM012A
Pittsburgh, PA	ZVM013A
Baltimore, MD	ZVM014A
Minneapolis-St. Paul, MN	ZVM015A
Atlanta, GA	ZVM017A
San Diego, CA	ZVM018B
Denver-Boulder, CO	ZVM019A
Seattle-Everett, WA	ZVM020A
Milwaukee, WI	ZVM021A
Tampa-St. Petersburg, FL	ZVM022A
Kansas City, MO-KS	ZVM024A
Phoenix, AZ	ZVM026A
Indianapolis, IN	ZVM028A
Portland, OR-WA	ZVM030A
Sacramento, CA	ZVM035A
Greensboro-Winston Salem-High Point, NC	ZVM047A
Charlotte-Gastonia, NC	ZVM061A
Raleigh-Durham, NC	ZVM071A

15 licenses for which Interactive America Corporation failed to make timely down payments:

<u>MSA</u>	<u>License No.</u>
San Diego, CA	ZVM018A
San Jose, CA	ZVM027A
San Antonio, TX	ZVM033A
Memphis, TN-AR-MS	ZVM036A
Salt Lake City-Ogden, UT	ZVM039B
Oklahoma City, OK	ZVM045A
Nashville-Davidson, TN	ZVM046B
Honolulu, HI	ZVM050A
Tulsa, OK	ZVM057A
Las Vegas, NV	ZVM093B
Lakeland-Winter Haven, FL	ZVM114A
Santa Barbara-Santa Maria-Lompoc, CA	ZVM124A
Salinas-Seaside-Monterey, CA	ZVM126A
Reno, NV	ZVM171A

Fort Pierce, FL

ZVM208A